

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS TAGG III, JEANENE TAGG, and JACK
BELZER, Personal Representative of the Estate of
THOMAS TAGG IV, Deceased,

Plaintiffs-Appellants,

v

TRANSAMERICA INSURANCE COMPANY OF
AMERICA, FRANKENMUTH MUTUAL
INSURANCE COMPANY and FARMERS
INSURANCE EXCHANGE,

Defendants-Appellees.

UNPUBLISHED
June 16, 1998

No. 200771
Genesee Circuit Court
LC No. 92-018199 CK

TRANSAMERICA INSURANCE COMPANY OF
AMERICA,

Plaintiff-Appellee,

v

THOMAS TAGG III, JEANENE TAGG, and JACK
BELZER, Personal Representative of the Estate of
THOMAS TAGG IV, Deceased,

Defendants-Appellants.

No. 200772
Genesee Circuit Court
LC No. 96-047998 CK

Before: Gribbs, P.J. and McDonald and Talbot, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs appeal as of right the orders granting summary disposition under MCR 2.116(C)(10) to defendant insurers in No. 200771, while defendants appeal as of right the

order granting plaintiff Transamerica's motion for summary disposition under MCR 2.116(C)(10) in No. 200772.¹ We reverse and remand for arbitration.

The facts of this case are well-summarized in *Tagg v Transamerica*, unpublished per curiam opinion of the Court of Appeals, decided April 12, 1996 (Docket No. 164081) [*Tagg I*]. Following the remand of No. 200771 to the trial court, the Taggs renewed their motion to compel arbitration and sought the reassignment of the action to another trial judge, while the insurers responded with motions for summary disposition. Subsequently, the trial court denied the Taggs' motion to reassign the case to the other trial judge; granted Frankenmuth's motion for summary disposition on the ground that William Sprague's vehicle was not "uninsured" for the purpose of uninsured motorist coverage and on the alternate basis that Frankenmuth revoked its arbitration clause; and granted Farmers' motion for summary disposition on the ground that the Taggs' decedent was not an insured person for the purpose of Farmers' coverage because he was not a resident of Mrs. Tagg's household and because Mrs. Tagg was not entitled to recover damages under the Farmers' policy because she did not sustain "bodily injury" as defined by the policy. In No. 200772, the trial court also granted Transamerica's motion for summary disposition on the basis that there was no claim to arbitrate because Mr. Tagg had canceled his policy with Transamerica before the accident. Given that the issue concerning the reassignment of the action to a different judge is moot, we will consider the Taggs' claims against each insurer in seriatim.

Frankenmuth

I

First, the trial court erred by granting summary disposition to Frankenmuth and denying the Taggs' motion to compel arbitration on the basis that the Sprague automobile was not "uninsured" for the purpose of the uninsured motorist provision of the Frankenmuth policy.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id.*; *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994). Giving the benefit of reasonable doubt to the nonmovant, the court must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995); *Farm Bureau Ins v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991).

An insurance contract should be read as a whole and meaning given to all terms. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). The contractual language is to be given its ordinary and plain meaning, and technical and constrained constructions should be avoided. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 71 n 1; 467 NW2d 17 (1991); *Royce v Citizens Ins Co*, 219 Mich App 537, 542; 557 NW2d 144 (1996). The terms of an insurance policy are given their commonly used meanings unless clearly defined in the policy. *Group Ins Co v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). An insurance contract is clear if it fairly admits of but one

interpretation. *Farm Bureau v Stark*, 437 Mich 175, 182; 468 NW2d 498 (1991). If an insurance contract's language is clear, its construction is a question of law for the court. *Taylor v Blue Cross*, 205 Mich App 644, 649; 517 NW2d 864 (1994). In any event, any ambiguities are to be construed against the insurer, who is the drafter of the contract. *State Farm Mutual Automobile Ins Co v Enterprise Leasing Co*, 452 Mich 25, 38; 549 NW2d 345 (1996).

Frankenmuth's insurance policy issued to Mr. Tagg provides in pertinent part:

“Uninsured motor vehicle” means a land motor vehicle or trailer of any type:

1. To which no bodily injury liability bond or policy applies at the time of the accident.

Here, the trial court erred in failing to conclude that the vehicle was uninsured. As the Taggs point out, the focus of the inquiry is whether there was any insurance policy that applied to the *vehicle* at the time of the accident. It is undisputed that the automobile was owned by Sprague at that time, but that there was no insurance policy that covered the vehicle. Hence, under the clear language of the insurance policy, the vehicle was uninsured.

Contrary to Frankenmuth's argument, *Bennett v Pitts*, 31 Mich App 530; 188 NW2d 81 (1971) is inapplicable. The issue in *Bennett* was whether an automobile is an “insured motor vehicle” within the meaning of the motor vehicle accident claims act, even though the owner of the automobile did not have insurance while the driver of the automobile had insurance covering him. Interpreting that statute in accordance with the principles of statutory construction, *Bennett* concluded that the fund was not liable because the vehicle was not “uninsured.” While *Bennett* involved the interpretation of a statute, the instant case requires the interpretation of an insurance policy wherein any ambiguity is construed against the insurer. Construing Frankenmuth's definition of “uninsured motor vehicle” to apply to the driver of the vehicle in the instant case requires a strained and forced construction in favor of the insurer that is contrary to the principles governing the construction of insurance contracts.

II

The trial court also erred in granting Frankenmuth's motion for summary disposition and denying the Taggs' motion to compel arbitration on the basis that Frankenmuth could revoke the arbitration agreement.

Although statutory arbitration agreements are irrevocable, MCL 600.5001(2); MSA 27A.5001(2), the rule governing arbitration agreements under common-law is that “either party may, unilaterally, revoke an arbitration agreement at any time before the announcement of an arbitration award, regardless of which party initiated the arbitration.” *Tony Andreski, Inc v Ski Brule, Inc*, 190 Mich App 343, 347-348; 475 NW2d 469 (1991). In *Andreski*, this Court addressed the question whether the trial court erred in ruling that the plaintiff had not timely revoked the arbitration clause of a lease with the defendant on the basis that it was estopped from revoking the arbitration clause because it had initiated arbitration proceedings that were already underway. In that case, the trial court, relying

upon this Court's decision in *E E Tripp Excavating Contractor, Inc v Jackson Co*, 60 Mich App 221; 230 NW2d 556 (1975), concluded that Andreski was estopped from revoking the arbitration agreement. However, the *Andreski* Court found that the plaintiff's revocation of the arbitration agreement was timely, concluding that "it would be inappropriate to apply the principle of estoppel against a party that initiated arbitration merely because it thereafter concludes that arbitration is no longer consistent with protecting its rights and interests and chooses litigation instead." *Id.* at 347.

In the instant case, it is undisputed that after this Court issued *Tagg I* and after the trial court's hearing after remand, Frankenmuth sent a letter to the Taggs' counsel expressly revoking the common-law arbitration agreement. Nevertheless, the Taggs contend that Frankenmuth was estopped from unilaterally revoking the arbitration agreement because its revocation letter was untimely. We agree.

In addressing this issue, we note that while no Michigan appellate court has found that a party was estopped from revoking a common-law arbitration agreement, this Court has impliedly held that the principle of estoppel may be applied against a party unilaterally revoking an arbitration agreement. First, in *Tripp, supra*, the plaintiff raised the argument that the defendant was estopped from asserting its unilateral revocation of the arbitration agreement because of its participation in the arbitration process and its delay in making objection. Because the *Tripp* Court found that defendant did not clearly revoke the common-law arbitration clause, it did not reach the question whether the defendant was estopped from revoking the arbitration agreement. On the other hand, in *Andreski*, the trial court ruled that the plaintiff was estopped from revoking the arbitration clause. While the *Andreski* Court found that the principle of estoppel was not applicable to the facts of the case, it nonetheless impliedly held that a party may be estopped from revoking an arbitration agreement under the proper circumstances.

Correlatively, we note that Michigan appellate courts have held that a party could, by its conduct, waive its right to arbitration. In *Bielski v Wolverine Ins Co*, 379 Mich 280, 287; 150 NW2d 788 (1967), the Court observed that *Shapiro v Patrons' Mutual Fire Insurance Company of Michigan*, 219 Mich 581, 588; 189 NW 202 (1922) held, as a matter of law, that "the insured [was] entitled to bring an action against the insurer without compliance with the arbitration requirement because the insurer had caused delay of an arbitration award for more than six months, which delay this Court termed unreasonable, unwarranted and oppressive to the insured." *Bielski, supra*, p 286. This Court has also held that the right to arbitration may also be waived by a party's conduct. *Salesin v State Farm*, ___ Mich App ___ ; ___ NW2d ___ (1998) (Docket Nos. 198199, 198319, rel'd 4-21-98 slip op p 6; *North West Mich Const v Stroud*, 185 Mich App 649, 652; 462 NW2d 804 (1990); *Hendrickson v Moghissi*, 158 Mich App 290, 298-300; 404 NW2d 728 (1987), quoting from 98 ALR3d 767, § 2, pp 771-772; see also Anno: *Arbitration - Waiver or Estoppel*, 26 ALR3d 604. Specifically, in *Campbell v St John Hospital*, 170 Mich App 551, 559; 428 NW2d 711 (1988), this Court found that the defendant waived the right to demand arbitration because he "failed to raise the existence of the arbitration agreement until two years following the filing of plaintiff's complaint. . . ."

In light of these principles, we believe that Frankenmuth was estopped from revoking the arbitration agreement because its revocation was untimely. As the Taggs point out, the instant case began in November, 1992 when they filed a complaint to compel arbitration of their uninsured motorist

claims arising from the death of their fourteen year-old son in an accident on June 21, 1992. As this case proceeded through circuit court, Frankenmuth never sought to revoke the arbitration agreement nor did it even raise the issue that the agreement was revocable. Rather, it waited until the Taggs' appeal to this Court to raise the argument that the circuit court was without authority to order arbitration or to appoint an arbitrator because the agreement could be revoked at any time before an award. However, in *Tagg I*, this Court rejected Frankenmuth's argument because "Frankenmuth never revoked its agreement to arbitrate. Rather, it asserted that the dispute between the parties was not arbitrable under the contract, and later, that there was no basis upon which plaintiffs could recover." *Id.*, p 9. Thus, it was only after this Court's adverse ruling and after the case was remanded to the trial court that Frankenmuth actually revoked the arbitration agreement.

In this instance, we conclude that under the facts of this case Frankenmuth was estopped from revoking the arbitration agreement because its nearly four-year delay was "unreasonable, unwarranted and oppressive to the insured." *Bielski, supra*, citing *Shapiro, supra*. As the Taggs point out, "If Frankenmuth had revoked in a timely manner, the Taggs' claims against it would have been tried and over with by now." In so holding, we nevertheless repeat the call of Judge Griffin in his concurring opinion in *Andreski* urging the Supreme Court to do away with "Michigan's anachronistic doctrine of common-law arbitration that allows unilateral revocation of common-law arbitration contracts" because "the policy of unilateral revocation of common-law arbitration contracts is outdated and unsound."

Farmers

The trial court also erred in granting Farmers' motion for summary disposition and in denying the Taggs' motion to compel arbitration by ruling that Farmers' policy did not provide uninsured motorist coverage to the Estate of Thomas Tagg, IV or Mrs. Tagg. In *Tagg I*, this Court made it clear that Farmers was "not permitted to avoid [the arbitration] agreement by challenging the underlying merits of plaintiffs' claim." Issues involving the Farmers' policy were expressly confided to arbitration. Thus, pursuant to the remand order, the trial court was required to compel arbitration as to Farmers. *City of Kalamazoo v Department of Corrections*, ___ Mich App ___; ___ NW2d ___ (1998) (Docket No. 198027, rel'd 3-31-98) slip op p 2; *McCormick v McCormick*, 221 Mich App 672, 679; 562 NW2d 504 (1997). Consequently, we need not consider whether the decedent was a resident of Mrs. Tagg's household for purposes of insurance coverage or whether Mrs. Tagg sustained "bodily injury" as defined by the policy.

Transamerica

The trial court also erred by granting Transamerica's motion for summary disposition and denying the Taggs' motion to compel arbitration on the ground that Transamerica's policy had been canceled before the accident. First, the trial court had no authority to rule on this issue because the clear language of Transamerica's policy provides that any disagreement concerning whether the insured was legally entitled to recover damages was subject to arbitration. However, even assuming for the sake of argument that the trial court had authority to rule on the issue, it erred in granting Transamerica's motion for summary disposition and in denying the Taggs' motion to compel arbitration because Mr. Tagg did not cancel the policy before the accident.

Transamerica's policy provides in pertinent part:

- A. Cancellation. This policy may be cancelled during the policy period as follows:
 - 1. The named insured shown in the Declarations may cancel by:
 - a. Returning this policy to us; or
 - b. Giving us advance written notice of the date cancellation is to take effect.

As the Taggs point out, cancellation of an insurance policy by an insured requires that the insured must comply strictly with the provisions of the insurance policy and give unequivocal, unconditional notice to cancel the coverage. *Beaumont v Commercial Casualty Ins Co*, 245 Mich 104, 106-107; 222 NW 100 (1928). Further, in *Galkin v Lincoln Mutual Casualty Co*, 279 Mich 327, 331-332; 272 NW 694 (1937), the Court observed:

“Notice of cancellation, if given by mail, must be received before loss by the party entitled thereto, or by his agent authorized to receive the same, otherwise there is no cancellation, even though a by-law provides for service of the notice personally or by mail.’ * * *

“For discussion of authorities, see 6 Couch, Cyclopedia of Insurance, § 1440, where it is said:

“ And, as a matter of fact, the weight of authority seems to regard receipt of the notice as a condition precedent to cancellation.” . . .

* * *

“A notice of cancellation does not become effective until it is received”

Generally, strict compliance with the policy provisions is necessary regarding termination of an insurance contract for the purpose of preserving the contract intended by the parties. *Blecken v Allstate Ins Co*, 152 Mich App 65; 393 NW2d 883 (1989); *Beckner v Cadillac Ins Co*, 175 Mich App 632, 634; 438 NW2d 268 (1989).

In the instant case, the record shows that Mr. Tagg completed and signed a cancellation form on June 12, 1992 (nine days before the accident) at the office of his independent insurance agent, Ms. Janet Brenske. However, Ms. Brenske, wanting to assure uninterrupted coverage for Mr. Tagg, waited before submitting the cancellation form to Transamerica until she was sure that Mr. Tagg was covered by another insurer. However, after the accident, Brenske told a Transamerica claims representative investigating the accident about the existence of the cancellation form. At the request of Transamerica's claims representative, Brenske then faxed a copy of the cancellation form to Transamerica on July 9,

1992 (eighteen days after the accident). Thereafter, Transamerica sent Mr. Tagg a refund for a cancellation effective June 12, 1992.

On appeal, Transamerica primarily relies upon *Collins v Frankenmuth Ins Co*, 193 Mich App 716; 484 NW2d 783 (1992) in arguing that Mr. Tagg canceled the insurance policy on June 12, 1992 when he completed and signed the cancellation form that he left with his independent insurance agent. *Collins*, however, was vacated by our Supreme Court. 441 Mich 989 (1993). Notwithstanding, Transamerica also relies upon *Blekkenk, supra*, which held that “the clear language of [MCL 500.3020(1)(a); MSA 24.13020(1)(a)] provides that the insured may cancel his policy at any time upon request.” In *Blekkenk*, this Court agreed with the trial court that as a matter of law *Blekkenk* was without coverage because it was undisputed that he intended to cancel his policy and that Allstate’s agent prepared a cancellation request on an Allstate form and sent the cancellation form to Allstate with the policy before the accident.

Contrary to Transamerica’s contention, we do not believe that Mr. Tagg’s policy was canceled on June 12, 1992. First, the record shows that Mr. Tagg did not provide an unequivocal, unconditional notice of cancellation to Transamerica on June 12, 1992. Here, cancellation of the insurance policy was not communicated to, or received by, Transamerica before the loss because Ms. Brenske, Mr. Tagg’s independent insurance agent, decided to have him pay for overlapping coverage rather than run the risk of a lapse of coverage. Thus, Mr. Tagg’s cancellation was conditional upon the acceptance of coverage by another insurer.

In addition, the acceptance of Mr. Tagg’s cancellation form by Ms. Brenske on June 12, 1992 did not constitute notice of cancellation to Transamerica as of that date because Ms. Brenske was not a Transamerica agent authorized to receive the notice of cancellation. *Galkin, supra*. Ordinarily, an independent insurance agent or broker is an agent of the insured, not the insurer. *Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 254; 535 NW2d 207 (1995). In this case, the facts show that Ms. Brenske was the agent of Mr. Tagg, not of Transamerica. Thus, unlike *Blekkenk, supra*, where the notice of the cancellation was received by the insurer’s agent *and* the insurer before the accident, Mr. Tagg’s notice of cancellation was not received by Transamerica or a Transamerica agent before the accident. So even assuming for the sake of argument that the trial court had authority to rule on this issue, it erred in granting Transamerica’s motion for summary disposition and in denying the Taggs’ motion to compel arbitration because Mr. Tagg did not cancel his policy before the accident.

Accordingly, we reverse and remand to the trial court with the instruction to order arbitration as to all three insurers, and to appoint a third arbitrator where necessary. We do not retain jurisdiction.

/s/ Roman S. Gibbs
/s/ Gary R. McDonald
/s/ Michael J. Talbot

¹ Hereafter, we will use “the Taggs” to refer to them as plaintiffs in No. 200771 and defendants in No. 200772, and will identify the insurers by name.